Supreme Court, U. S.
FILED
MAR 17 1980
ROBAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Misc. No. 79-1449

KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION, Et Al. - - - - - - - - - Petitioners

versus

REVEREND C. HARRY RUDASILL, Et Al. - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

October Term, 1979

Misc. No._____

KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION, ET AL. - *Petitioners*

v.

REVEREND C. HARRY RUDASILL, ET AL. - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioners, Kentucky State Board for Elementary and Secondary Education, et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kentucky decided October 9, 1979, rehearing denied December 18, 1979.

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[1]Kentucky Department of Education, Fayette County Board of Education; Pulaski County Board of Education; Daviess County Board of Education; Ohio County Board of Education; Owensboro Board of Education; Charles S. Combs, Director of Pupil Personnel, Daviess County School District; Earl Russell, Director of Pupil Personnel, Ohio County School District; C. Hillman McIntire, Director of Pupil Personnel, Owensboro School District; Joseph Richards, Director of Pupil Personnel, Pulaski County School District; Burtis Franklin, Director of Pupil Personnel, Fayette County School District; Henry E. Pogue, Jr., Chairman, Kentucky State Board of Education; James B. Graham, Superintendent of Public Instruction of the Commonwealth of Kentucky; Commonwealth of Kentucky, petitioners; Reverend C. C. Hinton, Jr., Reverend C. Harry Rudasill, Reverend T. Eugene Holmes, Reverend Guy G. Goodell, William L. Nicholas, Dean Nicholas, Edward Cof-

(Footnote continued on next page)

OPINION BELOW

The judgment and opinion of the Supreme Court of Kentucky is reported as *Kentucky State Bd., Etc.* v. *Rudasill,* Ky., 589 S. W. 2d 877 (1979). The judgment and opinion are set out in full in the Appendix, pp. 1a-15a.

JURISDICTION

The judgment and opinion of the Supreme Court of Kentucky was decided October 9, 1979, rehearing denied December 18, 1979. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

(Footnote continued from preceding page)
fey, Juanita Coffey, Lewis Sowder, Joyce Sowder, Glenda Hinton, Teresa A. Holmes, J. B. Hayes, Elizabeth Hayes, Robert Abshear, Brenda Abshear, Eugene Ranson, Susan Ranson, Charles Sibley, Harriet Sibley, Doris Jean Goodell, Clarence Frymier, Barbara Frymier, William R. Smith, Rita Smith, Norman McDonald, Jo Ann McDonald, Annie Carolyn Rudasill, Dick H. Johnson, Tereasa Johnson, William L. Kemp, Jo Ann Kemp, Terry Hicks, Frankie Hicks, Larry Lambrich, Jeanette Lambrich, Saline Baptist Church, Harvest Baptist Temple, Inc., Clays Mill Road Baptist Church, Inc., Frankfort Baptist Tabernacle, Inc., Portland Avenue Church of Christ, Kentucky Association of Christian Schools, Inc., Respondents.

QUESTION PRESENTED

Whether a State, Which Has a Compelling Interest in Seeing Its Children Educated, May Impose Reasonable Regulations Upon Those Asserting an Exercise of Religious Beliefs Who Desire to be a Substitute for the Performance of That Education Function by the State Itself.

CONSTITUTIONAL PROVISIONS INVOLVED

KENTUCKY CONSTITUTION,
SECTION 5:

". . . [N]or shall any man be compelled to send his child to any school to which he may be conscientiously opposed."

UNITED STATES CONSTITUTION,
FIRST AMENDMENT:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

UNITED STATES CONSTITUTION,
TENTH AMENDMENT:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT,
SECTION ONE:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS AND OF THE CASE

Kentucky Revised Statutes (KRS) 159.030(1)(b) requires children of compulsory school age (six to sixteen) to attend either a regular public day school or "a private or parochial regular day school approved by the State Board for Elementary and Secondary Education; . . ." KRS 156.160(7) *requires* the State Board for Elementary and Secondary Education, hereafter State Board, to adopt rules and regulations relating to the "approval of private and parochial schools of elementary or high school grade; . . ." The regulations promulgated and adopted by the State Board, 704 Kentucky Administrative Regulations (KAR) Section 6:010 required, at the time this lawsuit was commenced, that before a nonpublic school was opened, necessary state fire provisions and local health provisions had to be met, the building and grounds were to be approved by the State Department of Education, compliance with the six hours of actual classroom instruction in each of the days of the minimum school term of one hundred and seventy-five (175) days had to be indicated, the teachers had to meet the state certification requirement which was only a bachelor's degree from a standard college or university, and the program of studies offered were to be acceptable to the Department of Education. An additional requirement of having a minimum of twelve pupils enrolled in an elementary school was deleted after this lawsuit was commenced.

Additional pertinent Kentucky school laws attacked in this lawsuit which dovetailed with the regulations noted above were KRS 158.080, 156.445 and 161.030. KRS 158.080 requires that private and parochial schools are to be taught in the English language, offer instruction in the several branches of study required to be taught in the public schools of the state, and have a term not shorter than the term of the local public schools. KRS 156.445(2) was amended after the lawsuit commenced, remembering the Kentucky General Assembly meets only every other year, to permit text materials for private and parochial schools to be approved "if they are comprehensive and appropriate to the grade level in question notwithstanding the fact if they may contain elements of religious philosophy." And, lastly, KRS 161.030(2) called for no further educational requirements for teachers at nontax-supported schools than a bachelor's degree from a standard college or university, not a teacher's certification as such.

This case was instituted on September 19, 1977, in the Franklin Circuit Court by five fundamentalist Christian churches and their pastors, thirty-two parents of children enrolled in the nontax-supported "schools" of those churches and the Kentucky Associ-

ation of Christian Schools, Inc. The complaint sought a declaratory judgment and injunctive relief on the basis that the above referred to State Board requirements for approval of the nonpublic substitutes for public school education were *ultra vires* or, in the alternative, the requirements were unconstitutional under the First, Ninth, and Fourteenth Amendments of the federal Constitution and Sections Two, Five, and Twenty-seven of the Kentucky Constitution.

The trial court entered *ex parte* a temporary restraining order on the basis of the allegations contained in the verified Complaint. On November 15, 1977, following a hearing on respondent's Motion for a Temporary Injunction, the trial court entered a temporary injunction that, in essence, enjoined the petitioners from commencing any criminal prosecutions against any person by reason of a child of compulsory age attending a nonpublic Christian school that was not approved. Following trial on the merits, the trial court, on October 4, 1978, entered Findings of Fact (eighty-one in number) and Conclusions of Law and entered a written Memorandum. See Appendix, 16a-30a.

The Memorandum, Opinion and Judgment of the trial court granted respondents all of the relief demanded in their Complaint in holding, in substance, that:

1. The state's approval program, based on standards, was not proved by the state to have any reasonable relation to the objective of "advancing education quality" or to serve a compelling state interest in respect to education.

2. Application of the system to the respondent schools would encroach upon the exercise by the respondent individuals of their religious beliefs.

3. The respondents proved that their educational product "is at least equal to that of the public schools" in pure secular competence.

4. For the foregoing reasons, the state's approval system could not be enforced as against the respondents.

Again, the basic standards used in the state's approval system of private and parochial schools (which the trial court held unenforceable) were:

(1) Teachers must have a college degree.

(2) There must be courses of instruction, with minimum class hours, in basic subjects.

(3) Textbooks for required courses must either be on the state's selections list or must be comprehensive or appropriate to the grade level.

An appeal from the trial court's Order and Judgment was taken by the petitioners to the Kentucky Court of Appeals. The Supreme Court of Kentucky subsequently transferred the appeal to that court for consideration. The Supreme Court of Kentucky ignored the asserted federal issues upon which the trial court and all parties had considered the case and instead applied the language in Section 5 of the Kentucky Constitution that provides in part: "Nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed" to be more restrictive of the power of the state to regulate private and parochial schools than the First Amendment. The Supreme Court of Kentucky struck down the Common-

wealth's minimum standards for approval of private and parochial "schools." It is from this Judgment and Opinion of the Supreme Court of Kentucky that a review is sought.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has adversely decided an important question regarding the Commonwealth of Kentucky's interest in seeing that all of its school-aged children are educated. In so deciding, the Supreme Court of Kentucky avoided the many pertinent decisions of this Court and evaded the Commonwealth's interest cognizable under the First, Tenth and Fourteenth Amendments to the United States Supreme Court.

We do not have to "ride with the Federales." *Kentucky State Bd., Etc.* v. *Rudasill, supra,* at 879, fn. 3.[2] With that surprising admonition, the Supreme Court of Kentucky commenced its consideration of undoubtedly the most important church and state/education and religion case to be brought before Kentucky's highest appellate court.

[2] "We note at the outset that it is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution as it has been applied to the states. See *Wisconsin* v. *Yoder,* 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Consequently, the Supremacy Clause of Article VI of the U. S. Constitution does not require us to ride with the Federales in order to reach a decision. Those interested in the asserted federal issues can find a discussion in Comment. Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education, 67 Ky. L. J. 415 (1979). An overview of education and religion in the Commonwealth can be found in Comment, Separation of Church and State: Education and Religion in Kentucky, 6 N. Ky. L. Rev. 125 (1979)."

It is acknowledged by the petitioners, hereafter Commonwealth, that it must be shown that this Court does truly have jurisdiction as invoked under 28 U.S.C. § 1257(3) and, it is readily conceded that the Supreme Court of Kentucky did not in any way "ride with the Federales" just as it promised. However, this very fact, the purposeful and deliberate avoidance in considering this case under the First and Fourteenth Amendments, and instead hanging the decision upon a false state issue, is at once the basis of the Commonwealth's request to this Court for review and also the heart of the flaw requiring this Court if the writ is granted, to reverse the decision of the Supreme Court of Kentucky as being unwarranted under the federal Constitution.

State school laws and administrative regulations were attacked in the trial court and appellate court on both state and federal grounds of repugnancy to the respective Constitutions. The trial court and all of the parties predominantly relied on the federal First amendment issues for argument and resolution of the matter in controversy. Yet, the Supreme Court of Kentucky ignored the asserted federal constitutional issues. The Commonwealth asks this Court to determine that the Supreme Court of Kentucky decision did not rest upon a fair and substantial adequate state ground. See *Ward* v. *Love County,* 253 U. S. 17 (1920). If a constitutional issue is avoided by the state court on a nonfederal ground, "it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial,

constitutional obligations may not be thus avoided," *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282 (1932). The Commonwealth believes when the non-federal ground in this case, that is, Section 5 of the Kentucky Constitution, is considered, it does not independently and adequately support, or in fact support at all, the Supreme Court of Kentucky's complete deprivation of the state's authority to reasonably regulate nonpublic substitutes for public common schools in the education of the Commonwealth's children.

One manner of showing the insubstantiality of the non federal ground upon which a state court decision was made is the evidence of inconsistent prior opinions of the state court. In *National Asso. for the A.C.P.* v. *Alabama,* 357 U. S. 449 (1958), this Court held that it had jurisdiction to review a denial of certiorari by the Alabama Supreme Court of a judgment against the National Association for the Advancement of Colored People, although that judgment purported to rest upon a separate state ground. Jurisdiction of this Court was held to exist after this Court examined prior similar Alabama cases and found the case at hand to be inconsistent with the others. "We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its *past unambiguous holdings* as to the scope of review available upon a writ of certiorari addressed to a contempt judgment." *National Asso. for the A.C.P.* v. *Alabama, supra,* at 456 (emphasis added).

Similarly, the ruling of the Supreme Court of Kentucky in *Rudasill, supra,* is totally inconsistent with the

past unambiguous constructions of Section 5 of the Kentucky Constitution, upon which reliance by the Commonwealth, the respondents and the respective counsel was justifiable. Although the Supreme Court of Kentucky purported to examine the pertinent clause of Section 5 for the first time, see *Rudasill* at 879, this section of the Kentucky Constitution had been at issue in several earlier cases. Broad phraseology had been applied to Section 5 by Kentucky's highest appellate court. In *Williams* v. *Board of Trustees,* 173 Ky. 708, 191 S. W. 2d 507 (1917), Section 5 was said to guarantee separation of church and state. Later cases refer to both the federal and state Constitutions as guaranteeing religious freedom, as a broad principle. *Rawlings* v. *Butler,* Ky., [illegible]9 S. W. 2d 801, 804 (1956); *Seevers* v. *City of Somerset,* 295 Ky. 595, 175 S. W. 2d 18, 20 (1943); *Lawson* v. *Commonwealth,* 291 Ky. 437, 164 S. W. 2d 972, 975 (1942).

The purpose of the Kentucky Constitution, in this regard, had also been declared in broad terms. "The great aim . . . was to keep church and state forever separate as distinct institutions; to prevent the government of one assuming rightful control of the government of the other." *Hackett* v. *Brooksville Graded School Dist.,* 120 Ky. 608, 87 S. W. 792, 793 (1905). In *Rawlings, Seevers,* and *Lawson, supra,* the general language of the Court was used even though both the federal and state Constitutions were involved, as in *Rudasill.* No distinction or separation in construction was made between Section 5 of the Kentucky Constitution and the First Amendment to the United States Constitution.

Thus, clearly the construction of Section 5 as "more restrictive of the power of the state to regulate private and parochial schools than is the First Amendment to the federal Constitution as it has been applied to the states," see *Rudasill* at 879, fn. 3, contradicts the implications and statements in earlier Kentucky appellate cases, that both provisions have the same general aim and deserve identical constructions.

Section 5 of the Kentucky Constitution stands for nothing more and nothing less than that parents are not required to send their children to public schools. The Supreme Court of Kentucky itself emphasized this point in quoting from the constitutional debates language attributed to Mr. Beckner, the sponsor of the provision:

> "*This amendment simply provides that in the future there shall be no provision made requiring those who are conscientiously opposed to sending their children to public schools to do so. We do not know what may arise in the future in the zeal of those who come after us; and they may attempt to compel persons who are conscientiously opposed to the public schools to send their children to them, fixing pains and penalties for refusal.* . . . (Emphasis in the original.) *Rudasill* at 881.

That Section 5 grants to parents in Kentucky no more than the rights they would have under the ruling of this Court in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), is also borne out in the *Rudasill* opinion at 881. The Supreme Court of Kentucky stated:

> "The Beckner amendment, represented the position that while the state has an interest in the education of its citizens which could be furthered through compulsory education, the rights of conscience of those who desired education of their children in private and parochial schools should be protected. It was anticipated that without express protection of private and parochial education the state might try to prevent children from attending other than public schools. It must be recognized that this debate took place many years before the decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) which held the state could not require public school attendance to the exclusion of private and parochial schools. Obviously, the concern of the drafters of the Beckner amendment was well founded."

With the above construction of Section 5 and the open reference and acknowledgment that this construction parallels this Court's holding in *Pierce,* it cannot reasonably follow that Section 5 stands as an adequate state ground to completely erode the interest of the state in prescribing standards which a nonpublic substitute for a public common school must follow in providing education to children in the Commonwealth.

Section 5 of the Kentucky Constitution does not permit parents to refuse to send their children to some school. Obviously, very much at issue in this case is what is a "school" and who has the right to draw the minimal parameters to be met before the important task of educating the children of the Commonwealth is commenced. The Tenth Amendment to the United

States Constitution leaves to the Commonwealth the authority to develop a system of educating the children residing therein. The Commonwealth, through its General Assembly, has provided for "an efficient system of common schools throughout the state." Kentucky Constitution, Section 183. And it is simply the Commonwealth's position that if anyone desires to become a substitute for the Commonwealth educating its children in the public schools, then they should be required to meet some minimal threshold standards.

There is and can be no dispute of the proposition that to protect a compelling state interest, such as the fundamental education of children as is the case here, the state has power to regulate conduct and activity constituting an exercise of a religious belief. Admittedly, the regulations must burden the exercise of religious beliefs in the least restrictive manner possible; but, the fact is, of course, that the power of the state to use an approval system, based on standards, to protect the state's compelling interest in educational opportunity has been recognized over and over again by this Court, and never denied.

In *Pierce* v. *Society of Sisters, supra,* at 534, this Court said:

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

In *Everson* v. *Board of Education,* 330 U. S. 1 (1947) at 18, this Court said:

> "This Court has said that parents may, in the discharge of their duty under state compulsory attendance laws, send their children to a religious rather than a public school *if the school meets the secular educational requirements which the state has power to impose."* (Our emphasis.)

Of special application is this language from *Board of Education* v. *Allen,* 392 U. S. 236 (1968) at 245:

> ". . . Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. [Citing two Supreme Court and several state court decisions.] Indeed, the *State's interest in assuring that these standards are being met* has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. [Citing a California case.] These cases were a sensible corollary of *Pierce* v. *Society of Sisters: If the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. . . .*" (Our emphasis.)

Further, in *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972) at 213, this Court said:

> "*There is no doubt as to the power of a State,* having a high responsibility for education of its citizens, *to impose reasonable regulations for the control and duration of basic education.* [Citing *Pierce.*] Providing public schools ranks at the very apex of the function of a State. . . ." (Our emphasis.)

And in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) at 613, this Court said:

> ". . . *A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.* . . ." (Our emphasis.)

Finally, in *Wolman* v. *Walter,* 433 U. S. 229 (1977), at 240, this Court said:

> "There is no question that the State has a substantial and legitimate interest in *insuring* that *its youth* receive an adequate secular education. . . . The State may require that schools are *utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction.* . . ." (Our emphasis.)

For the foregoing reasons it is clear that Section 5 is not dispositive of the state's power to regulate private and parochial education. The state's power and the extent of that power was and continues to be governed and limited only by the principles of the First and Fourteenth Amendments which the Supreme Court of Kentucky deliberately refused to consider. Had the

Supreme Court of Kentucky considered this case against the religious exercise clause of the First Amendment, the Commonwealth would have maintained its ability, under the pronouncements of this Court, to require private and parochial schools that are used to fulfill the state's compulsory education requirements to meet certain standards. The Supreme Court of Kentucky *was* required to ride with the Federales. The Commonwealth respectfully urges this Court to grant certiorari so that the state's compelling interest in the education of its children may be adequately served.

A very important additional reason for this Court to grant the writ is the federal constitutional issue of denial of equal protection under the Fourteenth Amendment. Under *Brown* v. *Board of Education,* 347 U. S. 483 (1954), children are entitled to the Fourteenth Amendment right of equal protection of law, specifically the right of equal educational opportunity for the basic education that the state undertakes to require of each child. It is not a question of the state's *power* to see that each child has an equal opportunity, it is a matter of the *duty* of the state to do so under the Fourteenth Amendment. The state has the duty to see that all schools to which a child may be sent by his parents are adequate to provide the required opportunity, because the state cannot properly permit the child to be denied his constitutionally protected right by choice of the parent.

The Commonwealth does not have any reason to believe that the parents involved in this case would, in

the assertion of the parents' religious beliefs, deny their children an educational opportunity at least equivalent to that of a child attending a public common school. It is, however, to be noted by this Court that no child was a complaining party in the inception of this lawsuit. Compare Mr. Justice Douglas' dissent in *Wisconsin* v. *Yoder,* 406 U. S. at 241, et seq. Parents do not always act in the best interest of the child. Note *Parham* v. *J. L.,* —— U. S. ——, 61 L. Ed. 2d 101 (1979). Just as the state is not without constitutional control over parental discretion in dealing with children as regards physical or mental health, see *Prince* v. *Massachusetts,* 321 U. S. 158 (1944) and *Planned Parenthood of Missouri* v. *Danforth,* 428 U. S. 52 (1976), neither should it be concerning the educational well-being of children. Yet, the Supreme Court of Kentucky, by virtue of its baseless construction of Section 5 of the Kentucky Constitution, will permit parents to send their children to inadequate schools, thereby denying to the children their right to equal protection. The Supreme Court of Kentucky decision will tolerate no *preapproval* of purported schools utilized by parents for compliance with the state's compulsory education laws. The Commonwealth therefore further submits that this decision unconstitutionally destroys the power of the state to protect the state's compelling interest in seeing that each child in the Commonwealth is not denied equal opportunity of secular education.

CONCLUSION

Petitioners submit it is necessary for this Court to review the decision of the Supreme Court of Kentucky which deliberately and improperly evaded the federal constitutional issues at stake regarding the power of the state to establish reasonable approval regulations of private and parochial schools.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert L. Chenoweth, one of counsel for the petitioners, hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari were mailed, postage prepaid, to Honorable William B. Ball, Ball & Skelly, 127 State Street, P. O. Box 1108, Harrisburg, Pennsylvania 17108, and Honorable Theodore H. Amshoff, Jr., Amshoff & Amshoff, 3142 First National Tower, Louisville, Kentucky 40202, counsel for respondents, this March 14, 1980.

Robert L. Chenoweth

ROBERT L. CHENOWETH
Deputy Attorney General
Commonwealth of Kentucky

APPENDIX

RENDERED: OCTOBER 9, 1979

SUPREME COURT OF KENTUCKY

78 SC 642 TG

KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION (Substituted as Defendant for Kentucky State Board of Education) an Administrative Board of the Commonwealth of Kentucky, Et Al. - *Appellants*

v.

REVEREND C. HARRY RUDASILL, Et Al. - - *Appellees*

Appeal from Franklin Circuit Court
Honorable Henry Meigs, Judge
No. 88314

OPINION OF THE COURT BY JUSTICE LUKOWSKY—AFFIRMING IN PART—REVERSING IN PART

This case requires us to establish the perimeter within which the Commonwealth may regulate the curriculum and instruction in private and parochial schools. The trial court held that the Commonwealth's textbook approval, teacher certification, and school accreditation requirements, accompanied by the threatened prosecutions of the respondents for alleged violations of the compulsory education laws, violated the first amendment to the federal constitution and section 5 of the Kentucky constitution. We granted a joint motion for transfer of this appeal from the Court of Appeals to this court. Having considered the

arguments made by counsel and amici curiae,[1] we reverse in part and affirm in part.

This action was initiated by several pastors and their churches, parents of children enrolled in non-public schools of those churches, and the Kentucky Association of Christian Schools, Inc. [church schools]. The parties sought a declaratory judgment that the Commonwealth's standards for approval of private church schools were invalid. The church schools further sought and received below both temporary and permanent injunctive relief preventing the Commonwealth from imposing its approval standards upon the church schools and from prosecuting under the compulsory attendance laws, the church schools or the parents sending children to those schools. The church schools expressly recognized the state's interest in reasonable health, fire, and safety standards for those schools. Therefore, no issue is presented regarding this form of regulation by the state.

The defendants below, and appellants before this court, are the Kentucky State Board of Elementary and Secondary Education and its chairman, The Kentucky Department of Education, the Superintendent of Public Instruction, and four county boards of education along with their director of pupil personnel [Commonwealth]. The Commonwealth urges that KRS 156.160, which directs The Kentucky State Board for Elementary and Secondary Education to "adopt rules and regulations relating to: (7) Approval of private and parochial schools of elementary or high school grades; . . .," and KRS 158.080, which directs private schools to "offer instruction in the several branches of study required

[1]Amicus Curiae briefs were filed in support of the judgment below by the Lutheran Education Ministries of Kentuckiana, Inc., The League of Catholic Parent-Teacher Associations, and the General Conference of Seventh-Day Adventists. Both the Kentucky Association of School Administrators with The Kentucky School Boards Association and the Kentucky Education Association filed amicus curiae briefs in support of reversal.

to be taught in the public schools," permit the Commonwealth to apply their standards for accrediting Kentucky Schools, XLIV Educ. Bull. Ser. No. 11, to the church schools, to require that the church school teachers be certified, and to insist that textbooks used in the church schools be from the state list of approved textbooks. Attendance at church schools which are not so approved does not qualify the students there enrolled for the exemption from compulsory attendance in the public schools provided by KRS 159.030, in the opinion of the Commonwealth.

Section 5 of the Constitution of Kentucky provides in part "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; . . . ."[2] This court has not had occasion to construe this clause of section 5 found within the Kentucky Bill of Rights. But, we have the history of section 5 and of this clause to aid the court in divining the intent of the constitutional draftsmen in settling upon the words they chose to limit the power of the state. The task is now before us. We begin.[3]

[2]"Sec. 5. Right of religious freedom.—No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister or religion; *nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed;* and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience" (Emphasis added.)

[3]We note at the outset that it is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution as it has been applied to the states. *See* Wisconsin v. Yoder, 406 U. S. 205 (1972). Consequently, the Supremacy Clause of Article VI of the U. S. Constitution does not

(Footnote continued on next page)

The Kentucky constitutions of 1792, 1799, and 1850 each contained a bill of rights which provided for religious liberty.[4] The language of these sections remained virtually unchanged until the present constitution was adopted in 1891. The delegates to the Constitutional Convention of 1890 did not casually adopt verbatim the language of the bill of rights as it was found in the previous three Kentucky constitutions. Instead, these delegates examined the guarantees afforded the citizens of sister states by their constitutions along with the traditional protections given to and expected by the citizens of Kentucky. Then guided by their own consciences, they drafted a comprehensive bill of rights for the new constitution. It is generally recognized that the convention of 1890 was comprised of competent and educated delegates who were sincerely concerned with individual liberties. The debate on the bill of rights after it was reported from the Committee on Preamble and Bill of Rights lasted nearly two months and covers almost

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require us to ride with the Federales in order to reach a decision. Those interested in the asserted federal issues can find a discussion in Comment, Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education, 67 Ky. L.J. 415 (1979). An overview of education and religion in the Commonwealth can be found in Comment, Separation of Church and State: Education and Religion in Kentucky, 6 N. Ky. L. Rev. 125 (1979).

[4]"Sec. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship. Section 4. That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion."

Ky. Const. 1792, Art. XII.

The protection of religious freedom was found in Art. X. Sections 3 and 4 of the Constitution of 1799 and in Art. XIII, Sections 5 and 6 of the Constitution of 1850.

950 pages in the published proceedings and debates of the convention. It is from this bountiful harvest of history that we must glean the intent and interpretation of section 5.

The language guaranteeing religious liberty in the Commonwealth reported by the Committee on Preamble and Bill of Rights[5] did not include the clause "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." 1 Official Report of the Proceedings and Debates in Convention 300 (1890) [hereinafter cited as Debates]. The clause was specifically adopted by the convention and was the subject of comprehensive pointed debate.

The right of conscience protection relating to schools was the object of three distinct rounds in the debate on the bill of rights. First, the restriction was adopted as an amendment to the report of the Committee on Preamble and Bill of Rights while the convention sat as a committee of the whole. 1 Debates 846-49. Second, during preparation of the report of the committee of the whole for transmittal to the convention, a substitute section was adopted which omitted the clause. 1 Debates 1025. This fathered a debate between the advocates of "no man shall be compelled to send his child or children to any school" [hereinafter referred to as the Knott amendment][6] and of "no man shall be compelled to send his child to any school to which he may be conscientiously opposed"[7] [hereinafter

[5]Throughout the debate on the Bill of Rights Section 5 was referred to as section 4, as it was numbered in the original committee report.

[6]Mr. J. Proctor Knott of Marion County, sponsored the substitute section 4 and an amendment to add "no man shall be compelled to send his child or children to any school" to his substitute section as that clause was "inadvertently omitted" from the substitute as adopted. 1 Debates 1027.

[7]Mr. W. M. Beckner of Clark County sponsored this language in all three of the debates on section 5.

referred to as the Beckner amendment]. 1 Debates 1027-28; 1034-35. Neither amendment was adopted for the report of the committee of the whole, but this debate served to frame the issue of compulsory education for the third debate. When the report of the committee of the whole came before the delegates in convention, the issue was again debated, and the convention adopted the Beckner language which is present in section 5. 1 Debates 1135-45; 1243.

The debate over section 5 centered on whether compulsory education should be constitutionally proscribed. The first seeds of intent were sown in the first debate:

> "Mr. Beckner. As is well-known, there is a large element of a great religious organization, to which many persons in Kentucky belong, opposed to the American system of public schools. Their opposition arises from the fact that there is no religious instruction given in those schools. They are as conscientious in their opposition to those schools as I am in my belief in that system. I am axious [sic] for this Convention to do whatever can be done to render our system of public schools acceptable to all our people, and to remove every objectionable or obnoxious feature. It is believed by many that the time will come when we will have compulsory education. I am opposed to inserting in this Constitution any provision looking to compulsory education, leaving it to the future to determine that matter, when our public school system shall have been made more perfect than it is, and when our people are better prepared for it. In the wisdom of those who succeed us it may become proper then to introduce that system. *This amendment simply provides that in the future there shall be no provision made requiring those who are conscientiously opposed*

> *to sending their children to public schools to do so. We do not know what may arise in the future in the zeal of those who come after us; and they may attempt to compel persons who are conscientiously opposed to the public schools to send their children to them, fixing pains and penalties for refusal.*" . . . (Emphasis added.)

1 Debates 847

Even at this early point in the exchange of ideas the Beckner amendment became the compromise position between those who would proscribe the concept of compulsory education and those who would leave the Commonwealth absolutely unfettered.

The opposition to compulsory education was stated pointedly by Mr. Robert Rodes of Warren County:

> "There ought not to be any law in our Constitution or enacted by the Legislature to compel a man to send his child to school unless he wants to do it. . . . The family is the proper unit; and I think a good many gentlemen who have spoken will bear me out in the statement that the head of the family is the unity of government in this country, and the family have some rights which ought to be respected and cannot be invaded, and if there are not enough inducements for a man to send his child to school, the government ought not to interfere. . . ."

1 Debates 848-49.

The Beckner amendment represented the position that while the state has an interest in the education of its citizens which could be furthered through compulsory education, the rights of conscience of those who desired education of their children in private and parochial schools should be protected. It was anticipated that without express protec-

tion of private and parochial education the state might try to prevent children from attending other than public schools. It must be recognized that this debate took place many years before the decision in Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) which held the state could not require public school attendance to the exclusion of private and parochial schools. Obviously, the concern of the drafters of the Beckner amendment was well founded.

The Beckner amendment was worded so as to not hamper future legislatures in constructing a system of free public schools and requiring attendance at them by all save those who hold conscientious objection to them.[8] The Knott

[8]This purpose is illustrated by the following excerpt from the debate:

"Mr. Beckner: . . . My proposition was that no one shall be compelled to send his child to any school to which he may be conscientiously opposed, saving the conscience of those who are opposed to the public school system. This relieves the public schools of the opposition made by a number of good people throughout the land, that it is a Godless system, and they ought not to be required to send their children. *This does not prevent the Legislature from requiring them to send their children to some school.*

Mr. Carroll: Is not your substitute substantially the same as the substitute of the Delegate from Marion?

Mr. Beckner: No, sir.

Mr. Carroll: If a person says, 'I am conscientiously opposed to sending my child to a school,' can he be made to do so

Mr. Beckner: I think the Courts would have to determine whether it was a case of conscientiousness.

Mr. Carroll: Is not a man's conscience with himself?

Mr. Beckner: *The Courts would decide whether it was a matter of conscience or whether he wanted to keep his child at home.* Under the Census of 1880, Kentucky had one hundred and eighty thousand more voters who could not read than she had in 1870. The Census of 1880 showed that twenty-nine and three-tenths per cent of the people who ought to have been able to read could not. *Now, if the General Assembly in future should see fit to provide that children should be sent to school*

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amendment backers and their views that parents should be able to educate their children at the hearthside did not prevail. It is beyond quibble that the delegates meant to leave to the legislature the question of compulsory education.

Having concluded that the power to require universal education was not vitiated by the Beckner amendment to section 5, it becomes essential to identify the limits of this state power where the boundary between the state's interest in quality education and the individual's conscientious objection to public education is indistinct. May the Commonwealth control the manner in which private or parochial schools teach the young? Again, we look to the debates:

> "Mr. Beckner: [M]any think it is the logic of the free school system that those who do not send to the free school, shall be required to send their children a certain portion of time to some other schools, in order to give them the rudiments of an education. . . . My amendment simply says that those who have children shall not be required to send them to schools to which they may be conscientiously opposed. *It does not hamper the Legislature in any way but allows it to provide that they shall send them to some school. It may be a school of their own church, or a school of their own neighborhood. They have the right to choose what school they shall send them to. If the Legislature*

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during such a period of the year, I should think they should do so, and we should not hamper or prevent the Legislature from passing such a law . . . My amendment provides that children may be required to go to school, but parents shall not be compelled to send them against their conscience.

Mr. Knott: . . . I say every man has a right to educate his children in the bosom of his own family, and not to send them to any school. . . ." (Emphasis added.)

1 Debates 1034-35.

> *shall provide that the children shall be sent to some school for a certain portion of time, my amendment does not forbid it. . . . If it be the duty of the State to* provide education for all its children, and to *see that we have intelligent citizens,* and to provide the means for becoming intelligent, *then the State ought to be left free to see that the children are sent to schools.* . . ." (Emphasis added.)

1 Debates at 1137.

The Beckner amendment supporters clearly intended that the legislature be allowed to compel attendance at some *school,* the choice of which the child's parents could make as a matter of conscience, but the purpose of which would be to educate children to be citizens. That the convention understood the Beckner amendment to permit the requirement of compulsory attendance at a formal *school* vis a vis the family hearth is demonstrated by the perception of its effect by its opposition:

> "Mr. Knott: . . . Suppose he has conscientious scruples against all schools. Nevertheless, under the gentlemen's amendment he must send his children to school, although he may be perfectly well prepared and perfectly willing to educate them by his own hearthstone."

1 Debates at 1138.

The use of the word "school" in its ordinary sense by the drafters also supports this conclusion: "In its ordinary meaning the word 'school' denotes a place for systematic instruction in any branch or branches of knowledge." City of Chicopee v. Jackubowski, 348 Mass. 230, 202 N. E. 2d 913, 915 (1964); *see* Kesselring v. Bonnycastle Club, 299 Ky. 585, 186 S. W. 2d 402 (1945). "The word 'school' except when applied to a building or place, implies plurality and consociation." St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N. W. 113, 114-15 (1910). "A school the court holds to be an institution consisting of a teacher and pupils . . . gathered together for instruction in any branch of learning, the arts or the sciences." Benvenue PTA v. Nash Co. Bd. of Education, 4 N. C. App. 617, 167 S. E. 2d 538, 540-41 (1969) *quoting* Weisse v. Bd. of Educ., 178 Misc. 118, 32 N.Y.S. 2d 258 (1941). While the legislature could permit education in the home, it has not done so. *See* KRS 159.010 and 159.030.

The light shed by the purpose of compulsory education expressed by the advocates of the Beckner amendment aids in the definition of the state's interest in private and parochial education. The delegates perceived that universal education might be required in order to prepare children of the Commonwealth to intelligently participate as citizens in a democracy, i.e., to exercise the elective franchise, but not to uniformly develop them socially and morally in the same educational mold.[9] Mr. Beckner stated, "We educate our children here to make intelligent voters of them. . . . The main object of our public schools is that our people may be made intelligent enough to exercise the right of suffrage." 1 Debates at 1142. In support of this argument, Mr. W. R. Ramsey, representing Laurel and Rockcastle counties, said,

> "I do not understand by compulsory education, as it has been adopted in other States of this Union, that the parent shall be compelled to send his child to a school which has been provided by the State, but all the provisions which have been adopted by the different States provide that the child shall be placed in some school and receive some education; not that it shall be educated by the public schools of the State exclusively,

[9]State controlled homogeneous schools have provided a fertile field for the growth of totalitarian governments. See, e.g., A. Hitler, Mein Kampf, Reynal & Hitchcock Ed. 612-46 (1941).

> but that it shall be sent to some school, either public or private, and educated. . . . If the parent has conscientious objection to sending them to a public school, they must provide other means of educating them, so that they shall have at least twelve weeks schooling in each year."

1 Debates at 1143.

We therefore conclude that the delegates in adopting the Beckner amendment intended to permit the Commonwealth to prepare its children to intelligently exercise the right of suffrage by compelling attendance at a formal school, public or private or parochial, for a legislatively determined period each year. The question now becomes to what extent does the state's interest in educating its citizens to vote in a democracy permit the Commonwealth to control "a school" outside of the free public system.

The Commonwealth constructed the framework for implementing this interest in KRS 158.080. It provides that private and parochial schools shall (1) be taught in the English language; (2) "offer instruction in the several branches of study required to be taught in the public schools;" and (3) operate for a term not shorter than the public schools. From our examination of section 5, it is clear that KRS 158.080 does not offend the bill of rights provided that the "several branches of study" are rationally related to the education of children to exercise their right of suffrage and to participate in the democratic system.[10]

The Commonwealth argues that the KRS 158.080 requirement to "offer instruction in the several branches of study" means that the "*instruments* of instruction, such as teachers and books, be of reasonable *quality*." Brief for

[10]Obviously, such basic studies as reading, writing, spelling, grammar, history, mathematics and civics are so related. See KRS 158.650(3). This is not to say that other subjects may not bear a more remote but still rational relationship.

Appellants at 47. Therefore, it is posited, the statute "clearly contemplates that standards may be prescribed . . . with which a school must comply in order to be approved." *Id.* Section 5 does not allow the Commonwealth to reach this far.

It cannot be said as an absolute that a teacher in a non-public school who is not certified under KRS 161.030(2) will be unable to instruct children to become intelligent citizens. Certainly, the receipt of "a bachelor's degree from a standard college or university" is an indicator of a level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelligently exercise the elective franchise.

The Commonwealth's power to prescribe textbooks for use in private and parochial schools is likewise limited by Section 5. The textual materials used in the public schools are at the very heart of the conscientious opposition to those schools. To say that one may not be compelled to send a child to a public school but that the state may determine the basic texts to be used in the private or parochial schools is but to require that the same hay be fed in the field as is fed in the barn. Section 5 protects a diversified diet.

Pursuant to section 5 of the Constitution, the Commonwealth must "approve" a private or parochial school for the purposes of KRS 159.010 and 159.030 unless it demonstrates the educational institution in question is not a "school" as contemplated by the constitutional convention or does not serve to educate the children of Kentucky to enjoy their right of suffrage. Insofar as 704 KAR 10.022 applies the state accreditation standards to the private and parochial schools of Kentucky, it must fall.

If the legislature wishes to monitor the work of private and parochial schools in accomplishing the constitutional

purpose of compulsory education, it may do so by an appropriate standardized achievement testing program. Wolman v. Walter, 433 U. S. 229, 238, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977); *see, e.g.*, KRS 158.690. If the results show that one or more private or parochial schools have failed to reasonably accomplish the constitutional purpose, the Commonwealth may then withdraw approval and seek to close them for they no longer fulfill the purpose of "schools".

Nothing in this opinion should be read to prohibit:

A. Any private or parochial school from voluntarily complying with state standards of accreditation or seeking the financial advantages of KRS 171.215.

B. Any teacher in a private or parochial school from voluntarily seeking certification pursuant to KRS 161.030(2).

C. The Commonwealth from requiring private and parochial schools to comply with reasonable health, fire and safety standards as conditions of approval.

The judgment is affirmed in part and reversed in part and the cause is remanded for entry of a judgment consistent herewith.

All concur.

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FRANKLIN CIRCUIT COURT

DIVISION I

Civil Action No. 8834

REVEREND C. C. HINTON, JR., ET AL. - - *Plaintiffs*

v.

KENTUCKY STATE BOARD OF EDUCATION, ET AL. - - - - - - - - *Defendants*

MEMO OPINION AND JUDGMENT—Filed October 4, 1978

It would not be difficult to find in the record of this case abundant support for a conclusion that the regulatory scheme fashioned by the State Board, and sought by it to be imposed upon these plaintiff schools under the dubious authority of "approval" (KRS 156.160) is far beyond Constitutional limits of legislative delegation.

Recognizing, however, the fundamental duty of courts "to save and not to destroy", we may look to those other sections of the statute expressly dealing with private schools, to the manner of application of all of these, or we may fashion a remedy on other bases altogether, where determination of this question is unnecessary to a resolution of the case. *Bloemer* v. *Turner, et al.,* 137 S. W. 2d 387.

Even attributing vitality and validity to the power asserted by the State, the evidence taken in this case fails to demonstrate more than a scintilla of "colorable state interest" subserved by any exercise thereof in respect of these plaintiffs as against the latter's First Amendment right to the free exercise and expression of religion. Quite the con-

trary, the overwhelming weight of substantial, probative evidence conclusively shows the State's efforts to be but poorly conceived, ill-defined and quite direct interference with plaintiffs' religious liberty. *Erznoznik* v. *City of Jacksonville,* 422 U. S. 208.

Axiomatic it is that a system of universal free education may be regulated, regimented or ordered in almost any way, as much or as little as the tax-paying public supporting it may ordain; but even in the public sector the sovereign hand may be stayed in obedience to constitutional guaranties of individual liberty. Nowhere are courts more zealous in protection of individual liberties than where collisions between church and state are imminent. *Wisconsin* v. *Yoder,* 406 U. S. 205.

Plaintiffs here admit—judicially—the State's overriding interest in maintaining reasonable health, fire and safety standards for all schools, and offer submission to them along with uniform, standardized testing as the means of earning "approval" for their schools. What they cannot, and need not accept as encroachments on their free exercise of religious conviction are the "accreditation" requirements prescribed for state schools. *Sherbert* v. *Verner,* 374 U. S. 398.

Their incontrovertible proof shows—and the demeanor of the witnesses confirms—irreconcilable philosophical differences between their educational concepts, notions of textbook and curriculum content and teacher qualification. These differences are not fanciful or arbitrary, but very real and substantial, having a foundation in firmly held religious belief. In its attempts to denigrate or minimize the importance of these distinctions the State argues a worldly view that religious education is severable from secular; if this theory were susceptible of absolute proof there would be no value in faith, yet the enforced separation currently prevailing in public schools is casting in-

creasing doubts upon the value of education. Expert testimony in this case certainly established that there is not the slightest connection between teacher certification and enhanced educational quality in State schools, nor is there generally any such requirement in private schools. *U. S.* v. *Seegar,* 380 U. S. 163; *U. S.* v. *Ballard,* 322 U. S. 78.

In the face of truancy charges leveled by the State what is shown by these plaintiffs—with a clarity sometimes approaching radiance, compared with the turgid rhetoric of the State's "Standards for Accrediting Kentucky Schools," "A Handbook for Accrediting Kentucky Schools" and other publications—is a sober and devout belief that their religious faith should and does prevade every aspect of their lives, their churches and their schools. *U. S.* v. *Seeger,* 380 U. S. 163; *Welsh* v. *U. S.,* 398 U. S. 333.

By its intrusion upon plaintiff's protected right to free expression of religious belief in their schools the State has crossed the First Amendment line which forbids action either advancing or inhibiting religion. Any such entanglement in religious matters, absent a compelling State interest, is forbidden to the State by the Constitutions of the United States and Kentucky.

The State is unable to demonstrate that its regulatory scheme applied to the *public* schools has any reasonable relationship to the supposed objective of advancing educational quality; not only is that unfortunate truth apparent in this case, but more omniously, it has become apparent to the taxpaying Kentucky citizens who support the educational apparatus. Plaintiffs, on the other hand, have shown that without benefit of the State's ministrations their educational product is at least equal to if not somewhat better than that of the public schools, in pure secular competence. *State of Ohio* v. *Whisner,* 47 Ohio St. 2d 181; *Wisconsin* v. *Yoder,* 406 U. S. 205.

The rights of the plaintiffs named herein should be declared in accordance with the reasons herein set forth, and upon the Findings of Fact and Conclusions of Law annexed hereto; action and threatened action of the State against these plaintiffs or any of them heretofore enjoined temporarily, is now hereby enjoined permanently, all at defendants' costs.

Given under my hand this 4th day of October 1978.

(s) Henry Meigs
Judge, Franklin Circuit Court

Copies to:
Mr. William B. Ball
Mr. Theodore Amshoff, Jr.
Mr. Edward L. Fossett
Mr. Bert T. Combs

FRANKLIN CIRCUIT COURT

DIVISION I

Civil Action No. 88314

REVEREND C. C. HINTON, JR., ET AL. - - *Plaintiffs*

v.

KENTUCKY STATE BOARD OF EDUCATION, ET AL. - - - - - - - - *Defendants*

FINDINGS OF FACT AND CONCLUSION OF LAW—

Filed October 4, 1978

From the evidence and all of the record, the court makes the following Findings of Fact and Conclusions of Law, pursuant, in part, to requests made by plaintiffs. Any such requests for Findings and Conclusions not adopted herein are expressly rejected as being unnecessary to support the court's Memo Opinion and Judgment filed herewith.

FINDINGS OF FACT

1. Plaintiff pastors, parents, and churches are of the fundamentalist Christian faith.

2. The Plaintiffs are citizens and taxpayers of the Commonwealth of Kentucky.

3. The entire education offered by the schools of Plaintiff churches is an exercise of religion, and the providing of such an education as in integral part of the Plaintiff churches' ministry is a basic tenet of the fundamentalist Christian faith as held by Plaintiffs.

4. Compliance with the various regulations for approval and/or accreditation mandated by the State would violate the religious convictions of Plaintiffs.

5. Compliance with the various regulations for approval and/or accreditation mandated by the State, particularly in the area of textbooks and curriculum, would have the effect of imposing State chosen philosophical values upon the Plaintiffs.

6. Compliance with the various regulations for approval and/or accreditation mandated by the State would be financially impossible for some of the church Plaintiffs.

7. Plaintiff Association of Christian Schools is an association of eighteen Christian schools in Kentucky, some of which are accredited and some of which are not.

8. Plaintiff Association of Christian Schools has its own accreditation standards for both elementary and secondary schools.

9. The words "approved" and "accredited" have been used interchangeably by the State Board of Elementary and Secondary Education and the State Department of Education in approving private religious schools for purposes of complying with KRS 159.030.

10. As terms of art, the words "approved" and "accredited" are not interchangeable.

11. The Plaintiff pastors, parents, and churches have established private religious schools as part of their respective churches.

12. The schools are a ministry of the respective churches.

13. The attitude, support, example and lifestyle of a child's teachers and peers, and the school's environment, philosophy and textbooks, are critical in the moral development of the child and in the child's acceptance, assimilation and acquisition of religious beliefs and convictions.

14. Consistency between the home, school, and the church, in the teaching and communication of moral values and religious beliefs and convictions is critical to the child's learning of such values, beliefs and convictions, as well as other educational achievement.

15. After the age of seven or eight, the school—rather than the home or the church—has the strongest impact and influence upon a child's acceptance, assimilation and acquisition of religious beliefs and convictions.

16. No formal religion courses are taught in the Plaintiffs' schools, nor is there any separation of religious and secular subjects; rather, religious doctrines and examples are interwoven with all other subjects.

17. The church Plaintiffs' schools are schools in which religion is so pervasive that a substantial portion of their functions are subsumed in the religious mission which is the only reason for the schools' existence.

18. The church Plaintiffs' schools conduct and sponsor religiously oriented extra-curricular activities in addition to making a broad range of activities available to the students.

19. The church Plaintiffs' schools are located on premises owned by the Christian churches, the schools being in the same building as the church buildings or physically near them, permitting convenient access for religious exercises.

20. The church Plaintiffs' schools are housed in buildings which contain identifying religious wordings or symbols, and whose premises contain visible reminders of the Christian religion.

21. The church Plaintiffs' schools are schools which have an atmosphere in which Christian religious instruction and Christian religious vocations play a part in the educational function.

22. The church Plaintiffs' schools are schools which involve substantial religious activity and purposes.

23. The church Plaintiffs' schools are schools whose qualifications for employment of a teacher are first of all religious, and which employ only teachers who are "born again" Christians, reflecting Christian attitudes in their

conduct both on the school premises and in their personal lives.

24. The church Plaintiffs' schools employ Christian teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school.

25. The church Plaintiffs' schools employ teachers who work in schools which are operated to inculcate the tenets of the Christian religion and which are dedicated to rearing children of that faith.

26. Some of these schools are funded solely by free-will offerings, charging no tuition; the remainder are financed partially by tuition and partially by free-will offerings.

27. The said schools are of critical importance in the integration of children into the fundamentalist Christian faith community.

28. The Bible and the religious convictions of the Plaintiffs are the critical basis by which Plaintiffs judge the curriculum, conduct, attitudes of administrators and teachers, counseling methods, textbooks, and other programs utilized in these schools.

29. The example and lifestyle of the teachers and staff in these schools is in harmony with the religious convictions of the pastors, parents and children.

30. Some of the teachers in these schools are certified by the Commonwealth of Kentucky and some are not.

31. In one of these schools, a teacher was denied certification upon application to the State because the school in which she sought to teach was not accredited and/or approved by the State; while at the same time the pastor of the school was informed by the State that his school could not be accredited and/or approved because his teachers were not certified.

32. After consultation with professional educators, ultimate decisions regarding curriculum, textbooks, and teaching methods in these schools are made by religious authorities.

33. The private religious schools in question are taught in the English language and offer instruction in the several branches of learning as required by KRS 158.180; and are willing to furnish proof to the State Board of Education that these required branches of study are being taught, as well as furnish proof of pupil competence therein by making available to the State the results of the nationally recognized standardized achievement tests regularly administered by each school to its students.

34. Said schools comply with applicable State law (KRS 158.080) regarding the number of school days and hours.

35. The schools conducted by Plaintiff churches report attendance to the proper civil authorities as required by KRS 159.040.

36. The Plaintiff schools are in compliance with, and do not object to, the reasonable health, safety and fire standards established by the appropriate civil authorities.

37. The religious schools of the respective church Plaintiffs comply with the immunization laws of the State of Kentucky regarding school children.

38. The private religious schools operated by church Plaintiffs are all racially non-discriminatory.

39. None of the private religious schools operated by church Plaintiffs herein receive any Federal, State, or local funds.

40. The students in the Plaintiffs' schools are receiving training in civic and moral virtue, and good citizenship.

41. Students transferring from the Plaintiffs' schools back to public schools have made the transition successfully.

42. The students in Plaintiffs' schools are progressing in academics at a rate at least equal to their peers in accredited schools.

43. Plaintiff parents on account of religious convictions believe that they have a duty and a responsibility to

insure that their children are brought up in a religious environment.

44. Plaintiff parents on account of religious convictions seek consistency in the moral and religious upbringing of their children between home, church, and school.

45. Plaintiff parents have enrolled their children in the schools of Plaintiff churches on account of their religious convictions.

46. There is no school within a reasonable distance other than their Plaintiff church's school to which Plaintiff parents could in good conscience for reason of religious conviction send their children.

47. If faced with the choice of withdrawing their children from Plaintiff church schools or incurring criminal prosecution, Plaintiff parents for religious reasons would face such prosecution, and if convicted would pay a fine or go to jail rather than remove their children from the private religious schools in which they are now being educated.

48. The State deems its statutory responsibility for the supervision of schools to include the supervision of private, non-tax supported, religious schools.

49. The process for accreditation and/or approval of private religious schools is the same as for public schools.

50. The State educational officials predicate their actions, policies and procedures on the assumption that the State's rule-making and regulatory powers for the grading, classifying, accrediting of, and determining the scope of instruction in, public common schools apply also to private schools.

51. State educational officials claim that to be certified to teach in a private school in Kentucky requires a Bachelor's Degree from an accredited college or university.

52. A Bachelor's Degree may be obtained at an accredited State-supported university in such subjects as

Hotel-Motel Management, Restaurant Management, or Recreation.

53. Standards, sections, and regulations set forth in the publication *Standards for Accrediting Kentucky Schools* containing the word "shall" are determined by the State to be mandatory and compelled of all schools, public and private.

54. Some of the language of the *Standards for Accrediting Kentucky Schools* is admitted by the State to be vague and ambiguous, even in those Standards with which compliance is mandatory.

55. Various State officials who testified at the trial, including the Director of the Division of Accreditation of the Department of Education and the Chairman of Kentucky State Board of Elementary and Secondary Education, take contradictory positions with respect to the meaning of provisions contained in the "Standards" and respecting the enforcement provisions of the "accreditation"/"approval" process.

56. The intent of the individual school in seeking to comply with all mandatory State Standards (as judged by individual members of the Department of Education teams) rather than actual compliance, is a critical factor in determining whether or not to approve a private school.

57. Strict compliance with the State's facilities standards, curriculum and teacher certification requirements, and mandatory use of State-approved textbooks are all necessary for a private religious school to be granted State approved status.

58. The State bases "accreditation"/"approval" upon subjectively estimated percentages of compliance.

59. The non-approved and/or unaccredited schools of Plaintiff churches were denied such approval and/or accreditation because of their use of non-certified teachers, their refusal to use State-approved textbooks, and their teaching of the literal truth of the Bible as scientific fact.

60. In some subjects there are no State-approved textbooks which are religiously acceptable to Plaintiffs in keeping with their religious convictions; as all are in some manner objectionable—some because of what they include and others because of what they omit.

61. For a private religious school to secure the approval and permission of the State Board of Elementary and Secondary Education to use a textbook not on the State-approved textbook list, the content and material in the proposed text must compare favorably with the content and material in the parallel State-approved textbook, as subjectively determined by Department of Education personnel.

62. The State's regulations require State officials to pass judgment on religious matters.

63. The State is maintaining that prior application to, and approval by, the Department of Education and/or the State Board of Elementary and Secondary Education is required before a private religious school may teach even a non-credit course in which the Bible is used as a basic or supplementary text.

64. Quantitative standards governing building facilities, number of library books, and other such externals have no reasonable and demonstrable causal relationship to student achievement.

65. The extent or duration of teacher training can not be demonstrated by professional research to have any effect at all upon student academic achievement.

66. No pattern of student classification, teaching methods, or curricular emphasis in the classroom or in the administration of an educational enterprise can be proven uniformly superior.

67. Professional studies of standards and requirements similar to those sought to be imposed by the State upon Plaintiffs have in fact shown such standards and re-

quirements to have a negative effect, or no effect at all, upon quality education.

68. Professional studies show that there is no reasonable or causal connection, and to the contrary indicate that there is an insignificant or even negative relationship, between teacher certification and better education.

69. The State's requirement of a Bachelor's Degree has no causal or reasonable relationship to guaranteeing a quality teacher, and to the contrary potentially may ban an otherwise superb teacher from the classroom and thereby deny children the benefits of his or her talents.

70. While the body of standards, regulations, and textbook and curriculum requirements may represent an attempt by the State to identify the conditions necessary for good education, there is no empirical, demonstrable, or reasonable causal connection to the guaranteeing of quality education, and in effect such standards, regulations, and requirements preclude diversity and may hamper the development of superior educational and pedagogical methods.

71. Mandating the use of only State-approved textbooks in private religious school classrooms is based upon no reasonable findings and gives no guarantee of quality education.

72. In the schools of Plaintiff churches, each student's progress and achievement is measured and evaluated by nationally standardized tests used in private and public schools in Kentucky and throughout the Nation.

73. The California achievement test, used by many of the schools of Plaintiff churches, is a nationally recognized and reliable student's test in use throughout Kentucky and the Nation in both public and private schools.

74. The achievement tests used by the schools of Plaintiff churches are largely self-administering and can be given by the teacher with accuracy without instituting extensive training in testing technique.

75. Profiles of test results show that when measured against the National norm, the students in the schools of Plaintiff churches are achieving at or above said norm.

76. On August 30, 1977, the Kentucky State Board of Elementary and Secondary Education ordered local Directors of Pupil Personnel to initiate legal proceedings against the Plaintiff parents and others similarly situated whose children are in attendance at non-accredited or non-approved private religious schools.

77. In 1976-1977, there were over 16,500 chronic absentees in one Kentucky school district (a vast majority of whom were truant), of whom less than 1,000 were prosecuted.

78. The number of such truants were reported to the Kentucky State Board of Elementary and Secondary Education and the Kentucky Department of Education, yet no directive or mandate was ever issued for the prosecution of the parents of such truants.

79. The Kentucky State Board of Elementary and Secondary Education and/or the Department of Education has sought to impose upon the schools of the church Plaintiffs requirements for approval and/or accreditation set forth in *Standards for Accrediting Kentucky Schools, A Handbook for Accrediting Kentucky Schools,* and *General Requirements for the Establishment of Private Schools,* K-12, including and/or in addition to the teacher certification and textbook requirements hereinabove set forth.

80. Strict adherence to separation of Church and State is a doctrine of fundamentalist Christianity as practiced by Plaintiffs.

81. The religious beliefs and/or convictions of the Plaintiffs are truly and sincerely held.

CONCLUSIONS OF LAW

1. The imposition by Defendants of Textbooks approval requirements, teacher certification requirements, and

the requirements set forth in Paragraph 31 of Plaintiffs' Complaint hereof, and the prosecutions of parent Plaintiffs and pastor Plaintiffs announced by Defendants violate the Free Exercise Clause of the First Amendment to the Constitution of the United States.

2. The imposition by Defendants of textbook approval requirements, teacher certification requirements and the requirements set forth in Paragraph 31 of the Plaintiffs' Complaint, and the prosecutions of parent Plaintiffs and pastor Plaintiffs announced by Defendants violate Section 5 of the Constitution of the Commonwealth of Kentucky.

3. The imposition by Defendants of the textbook approval requirements, teacher certification requirements, and the requirements set forth in Paragraph 31 of the Plaintiffs' Complaint, and the prosecutions of parent Plaintiffs and pastor Plaintiffs announced by Defendants violate the Establishment Clause of the First Amendment to the Constitution of the United States.

Given under my hand this 4th day of October, 1978.

(s) Henry Meigs
Judge, Franklin Circuit Court
Division I